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ELECTRONIC FRONTIER FOUNDATION and  
9 FRED VON LOHMANN

10  
11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN FRANCISCO DIVISION**  
14

15 In re Subpoenas to Electronic Frontier  
Foundation and Fred von Lohmann

) **Case No. 3:10-mc-80276-JSW**  
) [Related to *Arista Records v. Lime Wire LLC*,  
) No. 06-5936 (KMW) (S.D.N.Y.)  
)

17 ) **MOVANTS' RESPONSE TO**  
) **RESPONDENTS' REQUEST TO FILE**  
18 ) **SUR-REPLY AND SUR-REPLY**  
) **REGARDING EXPEDITED MOTION TO**  
19 ) **QUASH SUBPOENAS**  
)

20 ) Date: no hearing date assigned  
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1 Movants file this Response to Respondents' Request to File Sur-Reply in order to correct  
2 Respondents' mischaracterizations to the Court.

3 First, however, Movants must respond to the following false statement in Respondents'  
4 Reply Supplemental Brief: "Contrary to EFF and von Lohmann's suggestion that Judge Wood  
5 retracted that conclusion after receiving further information from EFF and von Lohmann . . . ."  
6 Respondents' Reply Supp. Brief 3. Judge Wood did expressly retract the conclusion from her May  
7 11, 2010 order to which Respondents repeatedly refer. Judge Wood specifically stated:

9 On May 18, 2010, the Court received a letter from the Electronic  
10 Frontier foundation ("EFF") asking the Court to remove from pages 14  
11 and 15 of the Opinion the phrase 'regarding the need to establish a  
12 document retention program to purge incriminating information about  
13 LimeWire users' activities,' *on the ground that any advice given by*  
14 *Mr. von Lohmann was privileged and that the characterization of the*  
15 *advice is incorrect. The Court will file an Amended Opinion excising*  
16 *the language.*"

17 Boyd Decl. Ex. 3 at 1 (emphasis added). The amending order stated that Judge Wood would address  
18 privilege issues as they arose, but Respondents have chosen not to pursue that option, and they have  
19 not presented to Judge Wood any further briefs to challenge the attorney-client privilege covering  
20 communications between Lime Wire and Mr. von Lohmann.

21 Movants also respond to Respondents' suggestion that an increase in the scope of the  
22 subpoena requests by three years has no impact on Movants' briefs on this motion. Movants plainly  
23 recognized the subpoenas' date limitation in their supplemental briefs. *See* Movants' Reply Supp.  
24 Brief 4 ("requests are for 'any document which refers to or was created during the period from  
25 January 1, 2005 to present'"). Ms. Cohn was not aware of a limitation at the time she wrote her  
26 Supplemental Declaration on November 19, 2010, in which she had only one day to respond to the  
27 Court's order for supplemental declarations. Respondents' belated attempt to expand the scope of  
28 the subpoenas by three years affects several aspects of the briefing already submitted to this Court.

1 As a result of Respondents' representation that Mr. Fisk left Lime Wire in 2004 and the  
2 subpoenas' requests for documents from 2005 onward, Movants believed that no documents  
3 responsive to Respondents' requests would include relevant communications with Mr. Fisk.  
4 Movants cannot recall ever knowing of Mr. Fisk's former employment at Lime Wire and learned of  
5 it during the meet-and-confer process. See Supp. Boyd Decl. Ex. 6 (letter from Respondents'  
6 counsel informing Movants of Mr. Fisk's former employment), at 2. Respondents have presented no  
7 reason (nor are Movants aware of any reason) to believe Movants ever communicated with Mr. Fisk  
8 in his capacity as a Lime Wire employee. The examples Respondents provide as communications  
9 including Mr. Fisk and Mr. von Lohmann all took place in October 2006. Supp. Boyd Decl. Exs. 2,  
10 4. Any communication between Movants and Mr. Fisk *after* he left Lime Wire is plainly irrelevant  
11 to Lime Wire's beliefs and actions.  
12

13 While Movants did not attempt to segregate emails containing "limewire" by date,  
14 Respondents' request to increase the scope of this discovery by three years greatly increases the  
15 burdens of review and production on Movants. It is much simpler and faster to check the date of an  
16 email than to review the topics contained in the entire email. Furthermore, in estimating the number  
17 of communications that might require entry into a privilege log, Movants did not consider  
18 communications prior to 2005. Because Respondents informed Movants of this "inadvertent error"  
19 only yesterday and Mr. von Lohmann is currently out of the country, Movants have not been able to  
20 determine the exact effect this increase in the scope of the subpoenas would have on the burdens on  
21 Movants to produce a privilege log. Nevertheless, Movants believe such a change would multiply  
22 the burden at least twofold.  
23

24 This additional increase in burden only underscores the need for Respondents to pay all  
25 expenses associated with these subpoenas if the court enforces the subpoenas at all. Contrary to  
26 Respondents' accusations, Movants have no financial interest in the outcome of the *Arista Records*  
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1 v. *Lime Wire* litigation. EFF and Mr. von Lohmann in his capacity as an EFF employee regularly  
2 represented litigants on a *pro bono* basis. Movants' interest in the propriety of these subpoenas is  
3 their professional legal obligation to maintain their client's privileged confidential attorney-client  
4 communications and the confidentiality of their own attorney work product. Movants' interest in  
5 providing *pro bono* representation of Lime Wire is one of the public interest – the just and equitable  
6 adjudication of secondary liability principles in copyright law – which is precisely why Movants  
7 filed as *Amicus Curaie* in support of neither party. It is also a reason that courts have repeatedly  
8 referred potential *pro bono* clients to EFF. See Supp. Cohn Decl. ¶ 8.b. Movants are a non-profit  
9 legal services organization with only 32 employees and an individual former employee. McSherry  
10 Decl. ¶ 2. Respondents are for-profit “major record companies” with “thousands” of employees and  
11 far more able to bear this increased burden. Respondents' Opposition to Motion 2; Lu Decl. Ex. A  
12 (email from Respondents' counsel), at 1.  
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15 For these reasons, the Court should grant Movants' motion to quash as stated in Movants'  
16 earlier briefs.

17 Dated: December 15, 2010

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